ABSTRACTS OF RECENT AMERICAN CASES.

Supreme Court of Pennsylvania, Philadelphia, 1853.

Accord and Satisfaction.—In an action on a note and book account, the affidavit of defence set forth that on the day the note became due the plaintiffs agreed to accept in full satisfaction of both note and account, a certain description of yarn, at a specified price, to be delivered at a designated time and place; and that the yarn had been ready for delivery agreeably to the stipulation, and still was ready; but that the plaintiffs did not come or send for it. *Held* a good defence. *Christie & Shaw* vs. *Craig & Peterson.* BLACK, C. J.; LEWIS, J. dissented.

Assumpsit—Money paid under Compulsion.—One who pays without objection, to the tax collector of a borough taxes, which are in part legal, and in part illegal, cannot recover back the part illegally assessed. *Borough of Allentown* vs. *Saeger.* LOWRIE, J.

Bill of Exchange—Affidavit of Defence.—The maker of an accommodation note cannot set up want of consideration as a defence against it in the hands of a third person, though it be there merely as a collateral security for an antecedent debt. An affidavit of defence in an action on the note, therefore, which alleges no more than this, will be insufficient to prevent judgment. *Lord* vs. *The Ocean Bank.* BLACK, C. J.

Nor will it be sufficient in such case if the affidavit alleges that there were other collateral securities more than sufficient to cover the debt, without the note; it must also show affirmatively that the securities have been realized, and the debt extinguished. *Ibid.*

Carrier—Bill of Lading—Parol Evidence.—In assumpsit against a carrier, it appeared that the defendant's canal boat in which the goods were carried, was wrecked on the Pennsylvania Canal, by reason of an extraordinary flood; that the boat had started on its voyage with one lame horse; that by reason of this, great delay had been occasioned in making the voyage; and that had it not been for this, the boat would have passed the point where the accident occurred. *Held,* that the accident was not the ordinary or proximate result of the original negligence of the carrier, and

that consequently he was not liable therefor. *Morrison* vs. *Davis & Co.* LOWRIE, J.

In cases of peril by extraordinary accident, the law requires of carriers ordinary care, skill, or foresight, to avoid the consequences likely to ensue. *Ibid.*

Though a bill of lading does not contain the usual exceptions against perils, &c., they are *prima facie* to be implied. *Ibid.*

Where a bill of lading contained none of the usual exceptions, it was *held* that oral testimony connected with advertisements and circulars of the carrier, was admissible to show that the latter had agreed to insure the safe delivery of the goods at all events and without exception; *held*, also, that it was not necessary for the shipper to show that the advertisements had come to his knowledge before the time of the delivery of the goods. *Ibid.*

Where carriers agree also to insure the goods conveyed by them, there is but one contract in all, and it should be declared on as such. *Ibid.*

County Philadelphia—Subscription to Railroad Stock.—In the absence of special legislation a county is not authorized to borrow money for a subscription to the stock of a railroad. *Brown, Randal & al* vs. *County Commissioners.* BLACK, C. J.

The 1st section of the Act of February 10, 1852, which provides that the "constituted authorities of any municipal or other corporation" may subscribe to the Sunbury and Erie Railroad, does not authorize the Commissioners of Philadelphia County to borrow money or levy a tax for the purpose of such subscription, without the aid of the County Board. *Ibid.*

The Acts of 1834 and 1836, with reference to the County Board are constitutional, and in force. The 4th section of the Act of April 15th, 1834, does not repeal the Act of April 10th, 1834. *Ibid.*

Deed—Reservation out of Grant.—R. conveyed to K. a tract of land, particularly described, with a clause in the deed in these words—"Excepting and forever reserving the liberty for the heirs and legal representatives of P. deceased, to dig, take and haul ALL the stone coal that is or may hereafter be found on the above described tract." The heirs of P. were entitled only to four-fifths of the coal, R. himself owning the other fifth, *held* that none of the coal passed to K. *Benson* vs. *The Miner's Bank.* WOODWARD, J.

Easement—Way—Adverse user.—The use of a way over another's land, whenever the party sees fit, without asking leave, and without objection, is an adverse user, which, if continued for more than twenty-one years, will give a title by presumption of grant. The burden of proof that the use of the easement was under some license, indulgence, or special contract, inconsistent with a claim of right, lies on the owner of the land. *Garrett* vs. *Jackson.* BLACK, C. J.

Equity—Injunction—Commonwealth.—A bill in equity, on the part of the Commonwealth, asking an injunction and receiver against a Bridge Company, on the ground that it is misapplying its income, must be signed by the Attorney General. If signed by private counsel merely, and at the instance of a private informer, it will be dismissed. *Commonwealth* vs. *Alleghany Bridge Co.* LOWRIE, J.

That the real relator is the Auditor General of the State is immaterial. *Ibid.*

Error—Certiorari—Taxes.—Where a special jurisdiction is conferred by statute in an inferior court, no appeal lies to the Supreme Court, unless where expressly given; but the regularity of the proceeding may be examined. *Campbell* vs. *Schuylkill Co.* BLACK, C. J.

The Supreme Court has no revisory power over the decision of the Common Pleas, under the Act of 1850, which gives an appeal to the latter Court from the Commissioners, in the assessment of taxes. Where, however, in such a case, the Common Pleas had erroneously dismissed an appeal, the Act of Assembly not authorizing such course, the Supreme Court directed the appeal to be reinstated, and awarded a *procedendo.* *Ibid.*

Under the Act of 1850, the Court of Common Pleas, on an appeal from the Commisioners, can only make a decree affirming or reducing the assessment, or, in case of a double assessment, striking out the one complained of; a decree dismissing the appeal, unless for irregularity or the mode or time of entering it is erroneous. *Ibid.*

Evidence—Witness—Interest.—A witness who is executor and residuary legatee of his father, who had been assignee for creditors, of a person under whom the defendant, in an action of trover for fixtures claimed the property, and had sold it with the assent of the plaintiff, is not an incompetent witness for the defendant. *Harlan* vs. *Harlan.* BLACK, C. J.

Execution—"Persons interested" to demand issue.—Only a judgment or other lien creditor is a "person interested," who, under the 87th Section of the Act of 1836, in regard to executions, is entitled to demand an issue, or appeal from a decree of distribution. *Smith* vs. *Reiff.* WOODWARD, J.

Executor—Power of Sale.—Where a testator ordered that his executor should not sell more of his real estate within one year, than would be sufficient to pay his debts, and should not sell the balance until five years after his death; a power of sale after the five years was held to be implied, and an inquest of partition before the expiration of that time was set aside. *Palmer's Appeal.* BLACK, C. J.

Fixture.—The machinery of a cotton mill is part of the realty, but it may be detached by the agreement of the owner and lien creditors, and converted into personalty, and if this be done, it does not pass with the freehold at a sheriff's sale. *Harlan* vs. *Harlan.* BLACK, C. J. See S. C. 3 H. 513.

Husband and Wife—Separate Use—Limitations—A trust for the separate use of a married person, ceases on her becoming sole, and she is then entitled to demand and receive from the trustee the *corpus* of the estate. *Harrison* v. *Brolasky.*—LOWRIE, J.

A trust for the separate use of a married woman, of a definite sum of money, with a power of disposition by will, and in default of appointment to go to her representattives, becomes on the death of the husband, an ordinary debt in the hands of the trustee, liable to be barred by the statute of limitations.—*Ib.*

Husband and Wife—Married Woman's Act—Resulting Trust.—Notwithstanding the Act of 1848, the husband is still entitled to the labor of his wife, and the benefit of her industry and economy. Her earnings and savings, not out of her separate estate, do not become her separate property, but belong to her husband as before the Act. *Raybold* v. *Raybold.* WOODWARD, J.

Therefore, where a husband purchased real estate with the earnings and savings of a wife during coverture, it was held that there was no resulting trust to the wife.—*Ib.*

Insurance—Particular Average.—A separate valuation in a policy of insurance of each parcel, bale or package of an article, is not equal to a separate insurance of each parcel, bale or package. As where a ship-

ment of cotton was insured thus: "on deck 104 bales, valued at $50 a bale." *Held*, that the assured was not entitled to recover, under the usual clause exempting the insurer from liability for particular average under 5 per cent., for a total loss of *four* bales. *Newlin* v. *North America Insurance Company.*—BLACK, C. J. Affirming S. C., 11 P. L. J. (4 Am. L. J.) 266.

Justice—Jurisdiction—It is no objection to the jurisdiction of an alderman, that a claim upon which suit is brought, was originally more than $100, the plaintiff admitting payments, which reduce it below that sum. *Herbert* v. *Conrad.*

Mechanic's Lien—A mechanic's lien was filed on the 8th of September, 1845, and a sci. fa. issued upon it on the 10th of December, in the same year; the suit was not further proceeded in till July 31st, 1850, after which there was a verdict for plaintiff, on 20th October, 1850. *Held*, that the issuing of the sci. fa. within the five years, kept alive the lien. *Sweeny* v. *McGettogan.*—LEWIS, J.

Mechanic's Liens—Apportioned Claims.—The mechanic's lien laws recognize the filing of one lien against several houses, and the apportionment of the amount among them; but they do not define the cases in which said joint lien is proper. In order to obtain such a definition, we must resort to the analogy of other cases; and the case of joint contracts requiring joint remedies, is an obvious one.

Here all the buildings were put up by the owner at one time and on one lot, and the materials were furnished for them all jointly, and it was entirely proper to make them the subject of one apportioned lien. *Taylor* v. *Montgomery.*—LOWRIE, J.

Presumption of Payment—The presumption of payment from lapse of time, is not rebutted by the removal of the debtor into another State, after the expiration of seven years, and his residing there for more than twenty years. *Kline* v. *Kline.*—WOODWARD, J.

Presumption of Payment—The presumption of payment of a specialty, cannot be rebutted except by evidence which will create a presumption equally strong the other way. Therefore, a demand within the twenty years, of the obligor on a sealed note, followed by a refusal on his part, to pay, and an assertion that the claim had been paid, and that he could prove it, is not sufficient for that purpose; nor, it seems, would the mere naked demand have been enough. *Sellers* v. *Holman.*—BLACK, C. J.

Practice, Affidavit of Defence—Where a judgment has been taken for so much of a claim as is admitted to be due in an affidavit of defence, and the amount is paid, it is a bar to any further proceedings to recover the balance of the claim. *Brazier* v. *Banning.*—BLACK, C. J. *McKinney* v. *Mitchell*, 4 W. & S. 25, distinguished.

Practice, Affidavit of Defence—Where a defendant is not informed of the facts of the case so as to enable him to, swear to, or to form an opinion with regard to them at the time, the time for filing an affidavit of defence may be enlarged. *Lord* v. *The Ocean Bank.*—BLACK, C. J.

Where the defence depends upon the consultation of books and papers in the hands of the plaintiff, who refuses to permit an inspection of them, it seems that the Court, if satisfied of this fact, may indefinitely suspend the rule for judgment.—*Ib.*

Practice—Service of Writ—Death of Defendant.—Where a summons is returned served when it has not been, and the defendant hearing of it, and endeavors to get the service quashed, and failing in this, appears to the action, he cannot complain here. *Smith* v. *Hewson.*—LOWRIE, J.

It is not good cause to abate a writ that one of the defendants was dead when the suit was brought. A plea in abatement goes to the declaration. We do not grant oyer of the writ in order to raise such an objection.—*Ib.*

Roads—Under the general Road law of 1836, the report of the viewers is to be made at the next term after their appointment. If for any sufficient reason it cannot be made, then the proper course is to apply to the Court to continue the order, and to make it returnable to the next succeeding term. A report made and confirmed at a succeeding term, or an adjourned Court, without such previous order, is irregular, and may be set aside. *Stauffer's Appeal.*—WOODWARD, J.

Surety—Stay of Proceedings—Damages.—A., being indebted to B., gave the latter a bond and a mortgage on land in New Jersey. B. caused judgment to be entered up on the bond in Pennsylvania, and took out execution against personal property. E., the mother of B., in consideration that B. should stay proceedings for a year, gave to the latter her bond, payable in that period.. Before the expiration of the year, B. foreclosed the mortgage in New Jersey. The land was sold for a less price than the amount of the mortgage debt; it was alleged through the improper conduct of B. In an action against E. on her bond, the jury found that

the stay was only intended to apply to the proceedings in Pennsylvania. *Held*, that the foreclosure of the mortgage was no answer to the suit on the bond, and that the conduct of the plaintiff at the sale only furnished a defence to the extent of the loss actually sustained thereby by E. *Everly* vs. *Rice*. BLACK, C. J.

The surrender, by a creditor, of securities in his hands, is only a defence *pro tanto* to a surety. *Ibid.*

Township.—In proceedings to erect new townships, or change the limits of old ones, an omission to give notice to the inhabitants is fatal. *Case of Norwegian Township.* BLACK, C. J.

Trust—Purchase by crier at sale.—Where, on a sale by a constable, he superintends the sale, and employs a crier merely as a substitute, the latter is not precluded from bidding in the property for himself. *Crook* vs. *Williams.* BLACK, C. J.

Even if the crier had been a trustee, the sale would have been voidable only; and, the price of the goods being applied towards the satisfaction of the debt of the plaintiff, the latter would have no right to interfere, there being no actual fraud. *Ibid.*

Trustees—Allowances.—Though trustees are, in general, allowed costs out of the estate, yet, where a trustee has an interest of his own, separate and independent of the trust, and brings the cestui que trust into court, merely to have the question with regard to his separate interest determined, he will be directed to pay the costs. *Raybold* vs. *Raybold.* WOODWARD, J.

Vendor and Vendee.—Set-off.—A creditor, who orders goods from his debtor, which the latter owns, and has on hand to sell, is not bound to accept a draft, in favor of a third party, for the price of the goods, and may set off against the price the vendor's indebtedness, on the ground of mutual dealings. But when a creditor sends his debtor into a distant market, as his agent, to purchase goods on his account, and the debtor executes the commission, the law implies a promise, on the part of the creditor, to pay the seller of the goods in the usual course of business, and he cannot set off against the price the indebtedness of his agent. *The Bank of Mobile* vs. *Relf.* WOODWARD, J.

Vendor—Notice of trust.—The memoranda on the margin of the appearance and execution docket, naming the attornies in the cause, are not so far a part of the record, as to charge a purchaser of land, under a sheriff's ven-

dee, with notice that such vendee was the attorney of the plaintiff in the execution, and therefore a trustee for him by constructive trust. *Reed* vs. *Bell.* LOWRIE, J.

Vendor—Warranty—Evidence.—In an action for the breach of a warranty of a horse, which consisted of an alleged spavin, testimony of witnesses, who had seen the horse about the time of the sale in the defendant's possession, that the horse was not spavined, and did not go lame, is admissible on the part of the defendant. *Weaver* vs. *Kruntzman,* WOODWARD, J.

Will—Improper influence—Husband and wife.—General bad treatment or past threats by a husband, are no ground for impeaching a will made by his wife in 1852. It must be also shown that the testatrix was coerced, or at least influenced, to make the will by the bad treatment received. *Ryan* vs. *McMahon.* WOODWARD, J.

Wills—Register.—Where, upon a caveat against admitting a testamentary writing to probate, the Register issues a precept to the Common Pleas, directing an issue, the facts are to be tried in the latter Court, and the Register's Court in such case has no jurisdiction. *Daniel's Appeal.* LEWIS, J.

Will—Devise—Vesting.—A testator gave to his two maiden sisters a life estate in land, and then provided that, after their death, it should go to his "then heirs at law, or their legal representatives, to them, their heirs and assigns, forever." At the death of his sisters, his next of kin were a brother's daughter, and the grandchildren of A., a sister, living at his death, but who had died before the termination of the life estate. *Held,* BLACK, C. J., diss., that the devise had given to A. a vested interest in one-half, and that her grandchildren were entitled, as her "legal representatives," to share to that extent, notwithstanding the 8th section of the Act of 1833, prohibiting representation among collateral relations after brothers' and sisters' children. *Stock's Appeal.*

Court of Appeals, Kentucky. December, 1852.[1]

Trespass—Quære, Cl. Fr.—A person having the legal title to land,

[1] The following important abstracts have been obligingly furnished by a Judge of the Court of Appeals.

and the right to the immediate possession of it, cannot maintain an action on the case against a wrong-doer, who enters thereon and commits a trespass; this action can only be maintained by the owner of a reversionary interest, or a person who has a title to the land, but not the right to its immediate possession. Nor can such a person maintain an action of trespass, because such an action can only be brought by one having the actual possession of the land, upon which the wrongful entry has been made. The want of remedy in such a case results from the negligence of the owner in failing to take the actual possession of the land. *Robertson* vs. *Rodes.*

Time—Error.—The final decree was rendered on the 18th October, 1848, and the writ of error was sued out on the 18th October, 1851. The defendant pleaded the statute of limitations. The time allowed by the statute to sue out a writ of error is three years next after the final decree.

Held, that when time is to be computed from an act done, the day on which the act was done must be included in the computation, because, since there is no fraction in a day, the act relates to the first moment in the day in which it was done; consequently, the day on which the decree was rendered, must be included in the computation of the time limited; and the three years had expired on the day previous to the one on which the writ issued. *Chibs* vs. *Smith's Heirs.*

Partner.—As a surviving partner has a right to control and manage the partnership effects, for the payment of the partnership debts and liabilities, he can, when the assets are not sufficient for the payment of all the debts of the firm, make an assignment, by which some of the creditors will obtain a preference over others in the payment of their debts. The estate of the deceased partner is not injured by such an assignment; the liability to which it will remain subject being precisely the same, whether the assets of the firm be applied to the payment of all the debts rateably, or to some of them to the exclusion of others. The creditors have no lien upon the assets of the firm, in the hands of the surviving partner, except such as they derive through the administrator of the deceased partner, who has only an equitable right to have the assets applied to the payment of the debts, and not a right to have them applied in any particular manner, which right is not affected or prejudiced by the assignment. *Wilson* vs. *Soper.*

City—Liability for injuries by mob.—The plaintiff sued the city, in its corporate capacity, for an injury to her dwelling house, situated within the

city limits, committed by a mob, who partially destroyed the property. She alleged in her declaration, that the officers of the corporation had knowledge of the existence and intentions of the mob, and negligently and wilfully failed and refused to disperse it, or to render her any assistance to protect her property from its illegal depredations.

It was decided, upon demurrer to the declaration, that the city, although liable for an injury sustained by an individual, which had been occasioned by a failure, upon the part of the corporation, to perform a direct and positive duty prescribed by statute, and incident to its corporate capacity, such as neglecting to keep the sewers and streets in repair, was not responsible either for the misfeasance or nonfeasance of its officers, unless the delinquency was authorized by the corporation, and that, consequently, if the plaintiff had been injured by the failure of the officers to perform their duty, they were personally liable, and she should not look to the city for redress. In cases where such a liability rested upon the city, it was imposed by special legislation; and, inasmuch, as the charter of the city of Lexington contained no provision subjecting her to responsibility for injuries to private property, inflicted either by individuals or by a mob, this action against the city could not be maintained. *Prather* vs. *City of Lexington.*

Powers—Trusts—Trustees.—When executors are constituted trustees, and an estate is devised to them for certain purposes, they derive their power from the will of the testator, and can perform any act which it authorizes them to do. If, however, the executors refuse to accept the trust, a Court of Chancery will have it executed; but the trustee appointed for that purpose derives his power from the Court, and not from the will, and can only execute the trust so far as he has been empowered to do it by the order appointing him. He may be authorized to execute it, in part or in the whole, as the Court may deem best; his acts, however, have to be regulated, not by the provisions of the will, but by the directions of the Court, which has undertaken the execution of the trust. *Harris* vs. *Jones' Heirs.*

Creditors—Lien.—Although it is a general rule, that on the death of a partner, whose individual estate is inadequate to the payment of his separate debts, the joint creditors will not be allowed to come upon the separate estate, *pari passu*, with the separate creditors; yet if, upon a settlement of the partnership accounts, there is a balance found due to the surviving partner, after all the firm assets have been exhausted, he will be

permitted, to the extent of that balance, to come upon the separate estate, and have a *pro rata* portion thereof with the separate creditors, inasmuch as the balance so found due is substantially a debt due from the deceased to the surviving partner. *Busby's Adm'r.* vs. *Chenault & Co.*

NOTICES OF NEW BOOKS.

The Law of Nisi Prius; comprising the Declarations and other Pleadings in Personal Actions, and the Evidence necessary to support them: with an Introduction, stating the whole of the Practice at Nisi Prius. By John Frederick Archbold, Esq. Third American, from the Second London Edition, with Notes referring to the Latest American Decisions. By John K. Findlay. In two vols. Philadelphia: T. & J. W. Johnson, 1853.

This book has always commanded the approbation of the profession, as two editions in England, and three here, abundantly testify. Nisi Prius books are emphatically among the working ones of the student and practitioner, being of constant daily use and reference; and hence they have always commanded a sale from their earliest introduction. None has, heretofore, been so very satisfactory as this recent work, by an accomplished and practised elementary law writer. The arrangement is excellent, the matter compactly and accurately stated, and the cases fully cited, which is all that can reasonably be asked of a compiler.

The Introduction, which was added to the Second Edition, is useful to the student and younger practitioner, as furnishing a kind of knowledge not readily reached in any other way, than by the consultation of numerous scattered authorities.

This edition is rendered much more useful than either of the former, by reason of the extended and well considered notes of Judge Findlay. The experience acquired by the Editor, while in the discharge of his judicial duties, has rendered him, in a special manner, fitted to the task of annotating a Nisi Prius book. While it would have been easy to have encumbered these volumes with voluminous notes and cases, borrowed from the digests, it was not easy to present, in a brief, terse, and accurate shape, the many points and cases furnished his readers by the editor, in these two very handsomely printed volumes. We think many of these notes